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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF KINGS
COUNTY,

Respondent,

JESSE MENDOZA,

Real Party In Interest.

F041595

(Super. Ct. No. 02CM2480)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of mandate/prohibition.

Ronald Calhoun, District Attorney, and James H. Jahn, Deputy District Attorney,
for Petitioner.

No appearance by Respondent.

Victor M. Perez, for Real Party In Interest.

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* Before Dibiaso, Acting P.J., Buckley, J., and Levy, J.

Real party in interest Jesse Mendoza (Mendoza) was arraigned on July 19, 2002, on charges of violation Penal Code section 487, subdivision (a) (grand theft), and two counts of section 508 (embezzlement).

On August 28, 2002, Mendoza demurred to the complaint. Petitioner filed opposition.

On September 16, 2002, a hearing was held on the motion. The court called Mendoza to testify. As will be discussed further, based upon this evidence, the court determined the crime occurred in Kern County, not in Kings County. Rather than sustaining the demurrer, the court “denied” it and treated the pleading as a motion to transfer venue. The court granted the motion and transferred the case to Kern County.

The present petition was filed on October 2, 2002, by the Kings County District Attorney. Responses were ordered by this court from both the superior court and real party in interest on November 26, 2002. On December 10, 2002, the superior court filed its response. On December 31, 2002, Mendoza filed his response.

DISCUSSION

In its response, the superior court concedes the defect in the complaint alleged by Mendoza in his demurrer (the crimes did not occur in the county where charged) did not appear on the face of the complaint. The court goes on to argue that, when the court received testimony on the issue and treated the demurrer as a motion challenging territorial jurisdiction-venue, it properly found facts to support its conclusion the alleged crimes were committed in a different county.

The superior court acknowledges the remedy imposed – change of venue – was probably in excess of its jurisdiction, and therefore properly the subject of a writ petition. Nevertheless, the court argues its ruling on venue was a lawful exercise of its discretion, and therefore not the proper subject of a petition by the People. The People should, according to the court, be limited to direct appeal to attack an abuse of discretion.

Finally, the court recognizes the more appropriate time for consideration of a motion challenging venue is after the preliminary hearing because the preliminary hearing provides the People with a more reasonable opportunity to present evidence in opposition to the motion, citing *People v. Simon* (2001) 25 Cal.4th 1082, 1100.

In his response, Mendoza argues the demurrer to the complaint “was the proper method of equity to object to the lack of territorial jurisdiction – venue – in the County of Kings.” Mendoza further argues the court’s granting of its “own motion for change of venue was proper”

The People have a limited right to petition for extraordinary relief. (*People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 625-626.) In sum, the People may seek extraordinary relief when the trial court has acted in excess of its jurisdiction, and the need for review outweighs the risks of harassment of the accused. Mandate is not available to the People for review of ordinary judicial error. Indeed, it is not available for egregiously erroneous orders when the order or ruling, on its face, constitutes a timely exercise of well-established statutory power of trial courts from which no appeal is provided in Penal Code section 1238.

Here, the court acted in excess of its jurisdiction. (See generally, *People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 519-520.) Neither the superior court nor Mendoza may convert what was done in this case to ordinary judicial error or an abuse of discretion under *Stanley* by merely recharacterizing the caption on the pleading filed by Mendoza from a demurrer to a motion for change of venue. The need for review by this court outweighs the risks of harassment to Mendoza, which under these facts is minimal. (See *People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 589.) In addition, the fact that error is ordinary or egregious does not, in and of itself, result in action in excess of jurisdiction. An order which, because it is untimely, incorrectly divests Kings County of jurisdiction and vests jurisdiction in Kern County is an order, in

this court's opinion, from which the People may properly seek writ review. (See e.g. *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 679-680.)

In general, since *Stanley* courts have taken “a broad view of ‘jurisdiction’ as it relates to a petition for writ of mandate by the prosecution.” (*People v. Superior Court (Broderick)*, *supra*, 231 Cal.App.3d at p. 589; *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 531-532.) If review is not permitted in this case, the People would be deprived of the right to present facts at the preliminary hearing in Kings County that would tend to support venue in that county. (See generally *People v. Superior Court (Broderick)*, *supra*, 231 Cal.App.3d at p. 589.)

As the court noted in *Simon*, the appropriate time to challenge venue is at the pretrial stage. This may be done when the accusatory pleading, on its face, reveals a defect in venue (see *People v. Goscinsky* (1921) 52 Cal.App. 62, 64), or at the preliminary hearing when the evidence fails to support venue in the court in which the proceeding is to be tried. (*People v. Simon*, *supra*, 25 Cal.4th at p. 1100; see also, *Bogart v. Superior Court* (1964) 230 Cal.App.2d 874, 875-876; *In re Huber* (1930) 103 Cal.App. 315, 316-317.)

In the present case, the accusatory pleading contained no defect of venue on its face so venue was not the appropriate subject of a demurrer. A demurrer constitutes a pleading raising a question of law challenging the sufficiency of the accusatory pleading. (Pen. Code, §§ 1002 & 1004.) A demurrer lies only for defects within the four corners of the accusatory pleading. Penal Code section 1004 sets forth the exclusive grounds for demurrer, one of which is lack of jurisdiction. (Pen. Code, § 1004, subd. 1.) As noted above, in its response to the petition, the trial court “admits that the defect asserted by [Mendoza] did not appear in the face of the complaint.” The court therefore properly overruled the demurrer: “I [the court] said the demurrer would be denied [*sic*].” The matter should have ended there.

Instead, however, after having first allowed the accused (Mendoza) to testify, the court went on to state its reason for overruling (denying [*sic*]) the demurrer: “because I’m treating it as a venue motion to change venue not a demurrer where a dismissal would be.”

By converting Mendoza’s pleading to a motion to change venue, and then taking defense evidence on the issue, the People were caught off guard and not afforded what, under *Simon*, would have been the People’s traditional forum (preliminary hearing) for the development of facts necessary to fend off a challenge to venue. (*People v. Simon*, *supra*, 25 Cal.4th at p. 1100.)

DISPOSITION

Petitioner is entitled to appropriate relief. (Code Civ. Proc., § 1085; *Whitney’s At The Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 266.) A peremptory writ of mandate is proper and should issue. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

Let a peremptory writ of mandate issue directing the Kings County Superior Court to vacate its order of September 16, 2002, in Kings County Superior Court action No. 02CM2480, which transferred venue to Kern County and to enter a new order overruling Mendoza’s demurrer.